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No. 613

In the Supreme Court of the United States

October Term, 1962

[illegible], Sam, petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[illegible]

[illegible]

[illegible]
Solicitor General,
[illegible],
Assistant Attorney General,
[illegible],
Attorney,
Department of Justice,
Washington, D.C., [illegible].

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 613

MITCHELL ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 27–30) is reported at 322 F. 2d 306.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1963. A petition for rehearing was denied on October 14, 1963. The petition for a writ of certiorari was filed on November 12, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for violation of the Mann Act.

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2. Whether the district court properly instructed the jury on the effect to be given to a witness's admission that he had committed perjury before the grand jury.

3. Whether the court's instructions submitted the case to the jury on a legal theory not urged by the government.

STATEMENT

After a trial by jury, petitioner was convicted in the United States District Court for the Western District of Virginia of a violation of the Mann Act and was sentenced to imprisonment for four years. The conviction was affirmed on appeal.

1. The government's evidence and the testimony of two witnesses called by the court may be briefly summarized:

The records of the Patrick Henry Hotel in Roanoke, Virginia, demonstrated that on four occasions between April and June, 1962, petitioner checked into the hotel with a woman registered as his wife (Tr. 47–53). An F.B.I. agent testified that petitioner admitted to him that petitioner had traveled with a Mrs. Mary Payne from Indianapolis, Indiana to Roanoke and registered at the hotel as man and wife. Petitioner had denied any knowledge of prostitution on Mary Payne's part (Tr. 55–59). Henderson, a bellman at the hotel, testified that he obtained "dates" for the woman he knew as petitioner's wife (whom he identified from a photograph) (Tr. 67–69, 72–73) and received 40% of her earnings (Tr. 76). The dates were usually filled by sending Mrs. Payne to the room

of the man (Tr. 72–73). If the dates were filled in the room occupied by petitioner and Mrs. Payne, petitioner would leave the room after being notified that a customer was coming (Tr. 75). When business was slow, petitioner would tell the bellman "to go out and get us some business" (Tr. 78–79). On some occasions, petitioner paid the bellman the money due him (Tr. 77, 78). On cross-examination, the bellman testified that when he first appeared before the grand jury he had denied knowing that Mrs. Payne was working as a prostitute (Tr. 117), but he admitted that this testimony had been false (Tr. 104) and that it had been corrected on subsequent appearances before the grand jury (Tr. 105, 116–117). He explained that he had been warned by petitioner not to reveal the facts (Tr. 88), and that he thought petitioner was a member of "the syndicate" (Tr. 127, 128). The night watchman at the hotel also testified that he had seen Mrs. Payne on two or three occasions leaving rooms other than her own after midnight (Tr. 143–145). Two other bellmen, named by Henderson, were called as court witnesses and said that they had no knowledge of any prostitution by Mrs. Payne (Tr. 156–159, 169–173).

2. The court instructed the jury that the credibility of a witness might be impeached by evidence that he had previously given contradictory sworn testimony and that if it appeared that any witness had been impeached in this manner, the jury had a right "to take into consideration such impeachment, in determining the value of the testimony of such witness" (Tr. 285). The court declined to give petitioner's requested in-

structions that if the jury found that any witness had previously committed perjury, it could "disregard the entire testimony of such witness except insofar as such witness may have been corroborated by other credible testimony," and that "all evidence of an admitted perjurer should be considered with caution and weighed with great care" (Tr. 217(a)–217(b)).

3. In argument to the jury, government counsel stated that the prosecution's case was based "solely on commercial prostitution," and that the jury should not return a guilty verdict "unless you believe beyond a reasonable doubt that this defendant brought this woman into Virginia, across state lines, for the purpose of prostitution" (Tr. 219). Defense counsel in his summation referred to the statement by government counsel that he was not prosecuting petitioner because petitioner and Mrs. Payne lived together as husband and wife (Tr. 246–247). The court instructed the jury that in order to find petitioner guilty it had to find beyond a reasonable doubt that petitioner knowingly transported Mrs. Payne "for the purpose of prostitution, debauchery or other immoral purposes" (Tr. 285–286) and that his intent and purpose at the time of transportation was to have Mrs. Payne "prostitute herself, or engage in other immoral acts" (Tr. 289–291). These instructions were proposed by petitioner without the words "other immoral acts" or "other immoral purposes." When the court indicated its intention to add these phrases, defense counsel said he had no objection (Tr. 210–211).

In the court of appeals, the government argued that petitioner's admitted acts in transporting Mrs. Payne as his mistress would alone support the conviction. The court of appeals did not read the district court's instructions as submitting any such issue to the jury and saw no occasion to decide any question other than the sufficiency of the evidence to support the charge of commercial prostitution.

ARGUMENT

1. The sufficiency of the evidence to sustain the conviction presents no issue warranting review by this Court. If the jury believed the testimony of Henderson, the bellman, and the corroborating testimony of the night watchman, there was ample evidence to support the conviction. Henderson's earlier sworn denial of knowledge of prostitution activities, as well as the testimony of the other bellmen, were matters for the jury to evaluate. See *Proffit* v. *United States*, 316 F. 2d 705 (C.A. 9).

2. The judge adequately instructed the jury that the contradictory sworn testimony originally given by Henderson was impeachment evidence to be considered in determining the truthfulness of the witness. The court was under no duty to instruct in the precise language requested by petitioner. *United States* v. *Parker*, 217 F. 2d 672 (C.A. 2), certiorari denied, 349 U.S. 959. Nor has petitioner suggested any authority for the proposition that the court was required to instruct along the lines which he had suggested.

3. The trial court did not submit the case to the jury on a theory not presented by the government. Both government and defense counsel made it clear to the jury that petitioner was not being prosecuted merely because he lived with Mrs. Payne as man and wife. In view of that fact, there is no reasonable possibility that the jury would have interpreted the judge's reference to prostitution and "other immoral acts" as permitting a conviction to rest merely on the relationship between petitioner and Mrs. Payne. As has been previously noted, defense counsel did not object to the court's amendment of his proposed instructions (Tr. 210–211).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

DECEMBER 1963.